

FCC MAIL SECTION

Federal Communications Commission

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 Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)	
)	
Rule Making to Amend Parts 1, 2, 21, and 25)	CC Docket No. 92-297
of the Commission's Rules to Redesignate)	
the 27.5-29.5 GHz Frequency Band, To)	
Reallocate the 29.5-30.0 GHz Frequency)	
Band, To Establish Rules and Policies for)	
Local Multipoint Distribution Service)	
And for Fixed Satellite Services)	
)	
Petitions for Further Reconsideration of the)	
Denial of Applications for Waiver of the)	
Commission's Common Carrier Point-to-)	
Point Microwave Radio Service Rules)	

FOURTH REPORT AND ORDER

Adopted: April 21, 1998

Released: May 6, 1998

By the Commission:

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I. INTRODUCTION

1. By this *Fourth Report and Order (Fourth R&O)*, we amend Part 101 of our rules to adopt partitioning¹ and disaggregation² rules for the Local Multipoint Distribution Service (LMDS). We believe that these rules will bring to LMDS the competitive benefits that are at the core of our partitioning and disaggregation policy - more efficient use of spectrum, increased opportunities for a variety of entities, including small businesses, to participate in the provision of LMDS and expedited delivery of service to unserved areas.³ In adopting these rules, we have followed the general framework for partitioning and disaggregation that we previously adopted for other wireless services in an effort to create regulatory symmetry among wireless licensees.⁴ We believe that these partitioning and disaggregation rules will afford LMDS licensees the desired flexibility to respond to marketplace demands.

II. EXECUTIVE SUMMARY

2. In this *Fourth Report and Order*, we adopt the following partitioning and disaggregation rules for LMDS:

- Partitioning of LMDS licenses is permitted based on any geographic area defined by the parties, provided they submit information to the Commission regarding the relevant boundaries or coordinates.
- Disaggregation of LMDS spectrum is allowed for any amount of spectrum, with no requirement that the disaggregator retain a certain amount of spectrum.
- Combined partitioning and disaggregation is permitted.

¹ "Partitioning" is the assignment of geographic portions of a licensee's authorized service area along geopolitical or other boundaries.

² "Disaggregation" is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

³ See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 21831 (1996) (*Broadband PCS R&O*).

⁴ See *Broadband PCS R&O, supra*; Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10795 (1997); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, FCC 97-223 (July 10, 1997); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, *Third Report and Order*, 12 FCC Rcd 10943 (1997); Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz Bands, ET Docket No. 95-183, *Report and Order*, FCC 97-391 (November 3, 1997).

- Parties to LMDS partitioning (or combined partitioning/disaggregation) agreements will have two construction options for the partitioned area. Under the first option, the partitionee may certify that it will satisfy the substantial service requirement for its partitioned area. Under the second option, the partitionor certifies that it has met or will meet the substantial service requirement for the entire market.
- Parties to LMDS disaggregation (or combined partitioning/disaggregation) agreements must state which of the parties will be responsible for meeting the substantial service requirement for the licensed area. Alternatively, parties may agree to share responsibility for meeting the construction requirement.
- Upon FCC approval, LMDS partitionees and disaggregatees will hold their licenses for the remainder of the original licensees' ten-year term and may earn a renewal expectancy similar to other LMDS licensees.
- Unjust enrichment payments for LMDS licensees that obtained a bidding credit at auction and partition or disaggregate to an entity that would not have qualified for such a credit will be calculated on a *pro rata* basis, using population for partitioned areas the amount of spectrum for disaggregated spectrum, and some combination thereof for combined partitioning and disaggregation.
- The Commission's current Part 101 assignment procedures will apply to LMDS partitioning and disaggregation.

III. BACKGROUND

3. On March 11, 1997, the Commission adopted the *Second Report and Order (Second Report and Order)*, *Order on Reconsideration*, and *Fifth Notice of Proposed Rule Making (Fifth NPRM)*⁵ wherein it established service rules to govern licensing of LMDS and competitive bidding rules to select among mutually exclusive LMDS applications. The Commission concluded that its actions would open the door for new broadband wireless services and that LMDS spectrum could be used to provide competition to both local exchange carriers (LECs) and cable television systems.⁶ It

⁵ Rule Making to Amend Part 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, CC Docket No. 92-297, Suite 12 Group Petition for Pioneer Preference, PP-22; *Second Report and Order*, *Order on Reconsideration* and *Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545 (1997); *Order on Reconsideration*, 12 FCC Rcd 6424 (1997); *Second Order on Reconsideration*, 12 FCC Rcd 15082 (1997) (*Second Order on Reconsideration*); *Third Order on Reconsideration*, FCC 98-15 (February 11, 1998) (*Third Order on Reconsideration*).

⁶ *Second R&O*, 12 FCC Rcd at 12552, ¶ 2.

envisioned that our LMDS service and licensing rules would foster the future growth of this new service and permit LMDS licensees to satisfy a broad array of their customer's communications needs.⁷ In addition, the Commission permitted partitioning and disaggregation by LMDS licensees to encourage spectrum efficiency and the more rapid deployment of service, and to leave the decision of determining the correct size of licenses to the licensees and the marketplace.⁸ It concluded that allowing partitioning and disaggregation for LMDS spectrum would create powerful tools for licensees to concentrate on core areas or to deliver services outside of the major market areas.⁹ The Commission further found that LMDS partitioning and disaggregation would provide opportunities for small businesses seeking to enter the multipoint video distribution and local telephony marketplaces.¹⁰

4. In the *Fifth NPRM*, the Commission sought comment on specific procedural, administrative and operational rules to govern LMDS partitioning and disaggregation.¹¹ It sought comment on how rights and obligations of LMDS licensees would be affected if such licensees were permitted to avail themselves of the partitioning and disaggregation options.¹² It also sought comment on whether there are any technical or regulatory constraints unique to the LMDS service that would render any aspects of partitioning and disaggregation impractical or administratively burdensome.¹³ In this connection, the Commission noted that it had recently adopted specific procedures for partitioning and disaggregation in the broadband Personal Communications Services (PCS) and sought comment on whether such procedures would be appropriate for LMDS.¹⁴ A total of five comments and five reply comments were received in response to the *Fifth NPRM*.¹⁵

IV. DISCUSSION

A. Available License Area

5. Background. In the *Fifth NPRM*, the Commission tentatively concluded that parties to a LMDS partitioning agreement should be afforded flexibility in defining partitioned license areas.¹⁶ It

⁷ *Id.* at 12636-8 and 12643-5, ¶¶ 205-209 and 221-227.

⁸ *Id.* at 12606-12608, ¶¶ 144-145, adopting 47 C.F.R. § 101.1111(a).

⁹ *Id.* at 12608, ¶ 145.

¹⁰ *Id.*

¹¹ *Fifth NPRM*, 12 FCC Rcd at 12713-12716, ¶¶ 410-424.

¹² *Id.* at 12713, ¶ 410.

¹³ *Id.* at 12713, ¶ 411.

¹⁴ *See Broadband PCS R&O, supra.*

¹⁵ See Appendix A for a list of commenters and reply commenters.

¹⁶ *Fifth NPRM*, 12 FCC Rcd at 12714, ¶ 413.

sought comment on this tentative conclusion and, in particular, asked whether there are any technical or other issues unique to LMDS that would dictate a different approach.¹⁷

6. Discussion. We conclude that LMDS licensees should have broad flexibility in defining partitioned license areas. As we noted in the *Fifth NPRM*, such an approach is consistent with our treatment of partitioning in other services, particularly broadband PCS.¹⁸ In addition, we believe that allowing LMDS licensees to partition their service areas along any boundaries they wish will enhance their ability to respond quickly to consumer demands. In this connection, we agree with CellularVision USA, Inc. (CellularVision) that such an approach will allow LMDS licensees to consider unique geographical or market characteristics when designing their business plans.¹⁹ We also are concerned that requiring LMDS partitioned areas to be based upon a uniform standard, such as geopolitical boundaries or county lines, might unnecessarily restrict LMDS partitioning opportunities. For example, Hardin predicts that LMDS operations will most likely consist of cell sites with a small range.²⁰ In this context, Hardin contends that partitioning based upon a minimum standard, such as geopolitical boundaries or county lines, would not accommodate small-scale partitioning options which may be desirable for LMDS spectrum.²¹ We also previously concluded that LMDS has the capacity to meet the more circumscribed needs of smaller operators and niche markets.²² We find that permitting partitioning into smaller units will further assist small operators to meet their business goals and will encourage the development of niche markets and innovative service offerings. Thus, we believe that more flexible partitioning will better serve the interests of LMDS licensees and the public.

7. As we have in all other contexts in which we have permitted partitioning, we will require that parties seeking approval to partition an LMDS license submit a description of the partitioned service area. The partitioned service area must be defined by coordinate points at every 3 degrees along the partitioned service area agreed to by both parties, unless either (1) an FCC-recognized service area is utilized (*i.e.*, Metropolitan Statistical Area, Rural Service Area or Economic Area) or (2) county lines are followed. If the partitioned service area includes an FCC-recognized service area or county and additional areas, applicants are required to identify the FCC-recognized service areas or county and give the aforementioned coordinate data for the additional areas. These geographical coordinates must be specified in degrees, minutes and seconds to the nearest second of latitude and longitude. For areas located in the coterminous United States and Alaska the geographical coordinates

¹⁷ *Id.*

¹⁸ *Fifth NPRM*, 12 FCC Rcd at 12713, ¶ 412 (citing *Broadband PCS R&O*, 11 FCC Rcd at 21847, ¶ 24).

¹⁹ See CellularVision Comments at 2-3 & 4-5; see also WebCel Communications, Inc. (WebCel) Comments at 7; Hardin & Associates, Inc. (Hardin) Comments at 1-2; Digital Broadcasting Corporation (DBC) Reply Comments at 3-4.

²⁰ Hardin Comments at 1.

²¹ *Id.*

²² *Id.*

must be based upon the 1983 North American Datum (NAD83).²³ For locations in areas such as Hawaii, Puerto Rico, the South Pacific Islands, etc. the geographical coordinates must be based upon the World Geodetic System of 1984 (WGS84).²⁴ This coordinate data should be supplied as an attachment to the assignment application, but maps need not be supplied.²⁵ In cases where an FCC recognized service area or county lines are being utilized, applicants must list the specific area(s) (through use of FCC designations) or counties that comprise the partitioned area.

B. Disaggregation Standards

8. Background. In conjunction with the general rule permitting disaggregation of LMDS spectrum in the *Second R&O*, the Commission did not propose any restrictions on the amount of spectrum that licensees could disaggregate.²⁶ In the *Fifth NPRM*, it nonetheless requested comment as to whether there should be spectrum limits on disaggregation.²⁷ The Commission asked commenters to indicate any unique characteristics of LMDS which would warrant such limitations.²⁸

9. Discussion. We conclude that no minimum or maximum limits should be imposed on disaggregation of LMDS spectrum. We agree with commenters' arguments that we should establish similar rules in LMDS for disaggregation as we established for other wireless services such as broadband PCS.²⁹ We also agree with WebCel that regulatory parity will be achieved by adopting a similar disaggregation rule for all wireless services.³⁰ As with partitioning, we believe that permitting market forces to determine whether and how much spectrum is disaggregated will ensure that LMDS licensees are able to use their spectrum more efficiently and to respond quickly to customer demand. In addition, we believe that affording LMDS licensees this flexibility will facilitate participation by small businesses in the provision of LMDS.

10. Based on our review of the record, we are not persuaded that there should be any restrictions on the amount of spectrum that LMDS licensees can disaggregate. We disagree with

²³ See Amendment of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, *Notice of Proposed Rule Making*, FCC 98-25 (released March 18, 1998) (*ULS NPRM*), para. 70.

²⁴ We note that NAD83 is a subset of WGS84. For mapping and charting purposes NAD83 and WGS84 should be considered equivalent.

²⁵ The procedures for submitting an application for LMDS partitioning and disaggregation are discussed *infra* at Section IV-G.

²⁶ *Second R&O*, 12 FCC Rcd at 12608, ¶¶ 144-145.

²⁷ *Fifth NPRM*, 12 FCC Rcd at 12714, ¶ 414.

²⁸ *Id.*

²⁹ See CellularVision Comments at 3-4 & 5-6; WebCel Comments at 7; DBC Reply Comments at 1-2.

³⁰ See WebCel Comments at 7-8.

Texas Instruments' argument that LMDS licensees cannot provide competition to LECs and cable television operators unless they are required to retain a substantial portion of their spectrum.³¹ To the contrary, we find that requiring LMDS licensees to retain a substantial portion of their spectrum could potentially exclude small businesses from entering the LMDS marketplace. We believe that such a result would ultimately limit, rather than encourage, competition.³² We also disagree with Texas Instruments' contention that LMDS has unique characteristics warranting a requirement that a licensee retain a predominant share of its LMDS spectrum.³³ Texas Instruments argues that we should follow the example of our decision in the direct broadcast satellite (DBS) proceeding.³⁴ In the *DBS R&O*, we required that DBS licensees, after 5 years from date of license grant, use a predominant share of their authorized spectrum for DBS service.³⁵ Texas Instruments argues that we should adopt a similar requirement for LMDS licensees with the majority of LMDS spectrum remaining with the original licensee and being used to provide LMDS.³⁶ We disagree that LMDS licensees should be required to retain a certain amount of their spectrum. In the *DBS R&O*, we required licensees to use a portion of their spectrum to provide DBS service to ensure that this spectrum is used principally for DBS service.³⁷ We enacted this restriction to ensure the viability of the DBS service and to carry out the international allocation of this spectrum for DBS use.³⁸ By contrast, there are no similar unique characteristics of LMDS, particularly in light of the fact that LMDS licensees can provide a wide array of terrestrial services.³⁹ The fact that licensees have the freedom under our rules to use their spectrum for different applications makes it potentially constraining to adopt a minimum disaggregation standard. Therefore, we find there is no public interest reason to restrict the amount of LMDS spectrum that can be disaggregated.

C. Combined Partitioning and Disaggregation

11. Background. In the *Fifth NPRM*, the Commission tentatively concluded that combined partitioning and disaggregation should be permitted to provide LMDS licensees with the additional

³¹ See Texas Instruments Comments at 5, n.8.

³² See DBC Reply Comments at 3-4.

³³ See Texas Instruments Comments at 3-5.

³⁴ *Id.* (citing Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, Report and Order, 11 FCC Rcd 9712 (1995) (*DBS R&O*)).

³⁵ See *DBS R&O*, 11 FCC Rcd at 9718, ¶ 17.

³⁶ See Texas Instrument Comments at 4.

³⁷ *DBS R&O*, 11 FCC Rcd at 9717-8, ¶ 15.

³⁸ *Id.* at ¶¶ 15 & 18.

³⁹ See *Second R&O*, 12 FCC Rcd at 12637-8, ¶ 207.

flexibility they need to respond to market forces and service demands.⁴⁰ With combined partitioning and disaggregation, it contemplated that an entity would have the flexibility to obtain a portion of Block A or Block B spectrum in only a portion of the original licensee's BTA.⁴¹

12. Discussion. We conclude that permitting combined partitioning and disaggregation will afford interested parties flexibility to provide a variety of service offerings, including those of particular interest to niche markets. We believe that this approach will further our regulatory goals of facilitating the provision of competitive service offerings, encouraging new market entrants, and promoting quality service to the public.

13. While several parties agree that combined partitioning and disaggregation should be permitted,⁴² WebCel and Alcatel contend that such an approach could be problematic.⁴³ WebCel expresses concern regarding the potential administrative burdens associated with processing numerous partitioning and disaggregation requests.⁴⁴ WebCel argues that such an approach would create the potential for a large number of applications overwhelming the Commission's processing resources and delaying delivery of LMDS service to the public.⁴⁵ We are unpersuaded by WebCel's speculative concern. We note that while this potential also theoretically exists in the other wireless services for which we have adopted partitioning and disaggregation rules, our experience has shown that we have been able to handle the partitioning and disaggregation applications without any resulting undue delay in the delivery of new services. In addition, we believe that any administrative burden of processing partitioning and disaggregation applications will be lessened by implementation of the Universal Licensing System (ULS) for wireless services, including LMDS, which is already partially on-line accepting electronically-filed applications.⁴⁶ We expect that the electronic filing and mapping capabilities of the ULS will ultimately allow for the expeditious processing of LMDS partitioning and disaggregation applications.

14. Alcatel argues that it is unclear how LMDS licensees are to conduct frequency coordination for partitioned and disaggregated licenses.⁴⁷ Accordingly, Alcatel seeks clarification as to the frequency coordination obligations of LMDS partitionees and disaggregates. We clarify that all LMDS licensees, including partitionees and disaggregates, are required to comply with the frequency

⁴⁰ *Fifth NPRM*, 12 FCC Rcd at 12714, ¶ 415.

⁴¹ *Id.*

⁴² CellularVision Comments at 7; WebCel Comments at 7-8; DBC Reply Comments at 2.

⁴³ *See* WebCel Comments at 9 and Alcatel Comments at 2.

⁴⁴ *See* WebCel Comments at 9.

⁴⁵ *Id.*

⁴⁶ *See ULS NPRM*, *supra* n.23.

⁴⁷ Alcatel Comments at 2.

coordination provisions set forth in Section 101.103 of the Commission's Rules.⁴⁸ We adopted this approach in the *Second R&O* and herein we do not provide an exception for partitioning and disaggregation.⁴⁹ We further note that the identity of neighboring LMDS licensees should be readily available in the Commission's database, particularly with the implementation of ULS. Thus, we conclude that the concerns expressed by WebCel and Alcatel do not present sufficient reasons for not permitting combined partitioning and disaggregation.

D. Construction Requirements

15. **Background.** LMDS licensees must provide "substantial service" to their service area within ten years.⁵⁰ In the *Fifth NPRM*, the Commission proposed that, for partitioned LMDS licenses, the partitionee must certify that it will satisfy the same construction requirements as the original licensee.⁵¹ The partitionor and partitionee would therefore be required to meet separate substantial service requirements for their respective portions of the partitioned service area.⁵² For disaggregation, the Commission proposed that the parties would be required to submit a certification, signed by both the disaggregator and disaggregatee, stating whether one or both of the parties will retain responsibility for meeting the substantial service requirement for the service area. It proposed that, if one party takes responsibility for meeting the performance requirement, then actual performance by that party would be taken into account in a renewal proceeding at the end of the license term, but such performance would not affect the status of the other party's license.⁵³ If the parties agreed to share the responsibility for meeting the performance requirement, then the performance of each of the parties would be taken into account in their respective renewal proceedings.⁵⁴

16. **Discussion Partitioned Licenses.** We conclude that the public interest would be furthered by adopting an approach analogous to that used in other contexts, particularly broadband PCS, rather than adopting our proposal for partitioning. In other wireless services, we have allowed licensees the flexibility to negotiate which party will be responsible for meeting the applicable construction requirements.⁵⁵ In each of those cases, our goal has been to ensure that licensees had the flexibility to structure their business plans while ensuring that partitioning not be used as a vehicle to

⁴⁸ See 47 C.F.R. § 101.103.

⁴⁹ *Second R&O*, 12 FCC Rcd at 12663-4, ¶ 279, adopting 47 C.F.R. § 101.103(g) for LMDS; see also *Third Order on Reconsideration*, at ¶¶ 115-123.

⁵⁰ See *Second R&O*, 12 FCC Rcd at 12659, ¶ 266; see also 47 C.F.R. § 101.1011.

⁵¹ See *Fifth NPRM*, 12 FCC Rcd at 12714-5, ¶ 416.

⁵² *Id.*

⁵³ *Id.* at 12715, ¶ 417.

⁵⁴ *Id.*

⁵⁵ See, e.g., *Broadband PCS R&O*, 11 FCC Rcd at 21857, ¶¶ 42-43.

circumvent the applicable construction requirements.⁵⁶ We have allowed parties to partitioning agreements in other wireless services the flexibility to choose between two options for satisfying the construction requirements. For example, we allow broadband PCS licensees the option of either agreeing to meet the construction requirements for their respective portions of the partitioned market or for the original licensee to certify that it had or would meet the five- and ten-year construction requirements for the entire market.⁵⁷ We adopted this second option to allow parties the flexibility to agree that one party would take responsibility for meeting the construction requirement for the entire licensed area.⁵⁸ Similarly, we believe that parties interested in entering into LMDS partitioning arrangements should be afforded the same flexibility.⁵⁹ Under the first option, the partitionor and partitionee would each certify that it will independently satisfy the substantial service requirement for its respective partitioned area. If a licensee fails to meet its substantial service requirement during the relevant license term, the non-performing licensee's authorization would be subject to cancellation at the end of the license term. Under the second option, the partitionor certifies that it has met or will meet the substantial service requirement for the entire market. If the partitionor fails to meet the substantial service standard during the relevant license term, however, only its license would be subject to cancellation at the end of the license term. The partitionee's license would not be affected by that failure.

17. As indicated in the *Second R&O*, the availability of partitioning will promote and facilitate smaller-scale service offerings and market niches to develop which would be appropriate for smaller operators who could not manage an entire BTA.⁶⁰ Our decision to offer two options is based on our belief that LMDS licensees may be motivated to enter into partitioning arrangements for different reasons and under various circumstances. For example, as discussed by DBC,⁶¹ a LMDS licensee might be motivated to partition its license in order to reduce its construction costs. In that case, the original licensee would have less population to cover in order to meet its substantial service requirement. Thus, it may find the first option most attractive for its purposes. Under another scenario, a LMDS licensee that has met or is close to meeting its substantial service requirement may be approached by another entity interested in serving a niche market in a portion of the service area. Under these circumstances, the second option may seem most attractive to the parties. We believe that the partitioning rules for LMDS should address both of these scenarios. We further believe that in both contexts partitioning cannot be used to circumvent the LMDS construction requirements. In any event, we note that we will examine each situation on a case-by-case basis when the licensees file their renewal applications and will be able to address any abuses of the partitioning options in that context.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *Second R&O, supra*, ¶¶ 266, 270-71.

⁶¹ DBC Reply Comments at 4.

18. In addition, pursuant to CellularVision's request,⁶² we clarify if a partitionor and partitionee elect to meet the substantial service for their respective partitioned areas, then we would make an independent assessment of the construction efforts of the partitionor and partitionee based on the partitioned area, population served, and actual service provided. We acknowledge CellularVision's observation that the service offering provided by a partitionee might be quite different than that provided by the original licensee.

19. *Disaggregated Licenses.* As we proposed in the *Fourth NPRM*, we establish two options for disaggregating licensees. This approach is consistent with what we have done in other wireless contexts.⁶³ We believe that it would be appropriate for either the disaggregator or the disaggregatee to assume full responsibility for construction within the shared service area, because service would be offered over the relevant population, even if not on the entire spectrum. As DBC points out in its comments, *supra*, we agree that this option could encourage a LMDS licensee to make some of its spectrum available to others. Accordingly, we will permit two options for meeting the construction requirements by disaggregators and disaggregatees. Under the first option, the disaggregator and disaggregatee would certify that they each will share responsibility for meeting the substantial service requirement for the geographic service area. If parties choose this option, both parties' performance will be evaluated at the end of the relevant license term and both licenses could be subject to cancellation. The second option would allow the parties to agree that either the disaggregator or the disaggregatee would be responsible for meeting the substantial service requirement for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the nonperforming party would be subject to cancellation.

20. We continue to believe that these build-out provisions fulfill our obligations under Section 309(j)(4)(B). We also believe that the auction and service rules which we are adopting for LMDS, together with our overall competition and universal service policies, constitute effective safeguards and performance requirements for LMDS licensing. We believe that service to rural areas will be promoted by our proposal to allow partitioning and disaggregation of LMDS spectrum. The options established herein are intended to provide the greatest possible flexibility to licensees and partitionees while ensuring that rural and niche market areas receive LMDS services. Accordingly, we continue to reserve the right to impose additional, more stringent construction requirements on LMDS licensees in the future in the event of actual anticompetitive or rural service problems and if more stringent construction requirements can effectively ameliorate those problems.⁶⁴

⁶² CellularVision Comments at 8. CellularVision requests that we clarify that the partitionee must meet its own substantial service requirement rather than the same substantial service requirement applicable to the original licensee.

⁶³ See cases cited in note 4, *supra*.

⁶⁴ See *Second R&O* at ¶¶ 271-72.

E. License Term and Renewal Expectancy

21. Background. LMDS licenses are granted for ten-year terms.⁶⁵ In addition, an LMDS licensee involved in a comparative renewal proceeding may qualify for a renewal expectancy if the licensee demonstrates that it has provided substantial service during its license term, and that it has substantially complied with the Communications Act and applicable Commission rules and policies.⁶⁶ In the *Fifth NPRM*, the Commission sought comment on whether our LMDS rules should provide that parties obtaining LMDS licenses for partitioned areas or disaggregated spectrum hold their license for the remainder of the original licensee's ten-year term.⁶⁷ It noted that, in the *Broadband PCS R&O*, the Commission found that allowing parties acquiring licenses through partitioning and disaggregation to "re-start" the license term from the date of the grant of the assignment application could allow parties to circumvent our rules regarding license terms and unnecessarily delay service to the public.⁶⁸ It also sought comment on whether LMDS partitionees and disaggregates should be afforded the same renewal expectancy as other LMDS licensees.⁶⁹

22. Discussion. We find that LMDS partitionees and disaggregates should hold their licenses for the remainder of the original licensee's ten-year term. This approach is supported by the commenters and is consistent with our action in other wireless services.⁷⁰ We see no reason to adopt a different approach for LMDS. As we did with licensees in other wireless services, we believe that LMDS licensees would have less of an incentive to fully utilize their available spectrum if they were permitted to wait until the end of their license term to partition a portion of their market or disaggregate a portion of their spectrum to another entity that would receive a full ten year license term.⁷¹ By limiting the license term for LMDS partitionees and disaggregates, we believe that there will be maximum incentive for parties to quickly utilize their spectrum and expedite the delivery of LMDS services to the public.

23. In addition, we will permit partitionees and disaggregates to obtain a renewal expectancy on the same basis as other licensees. All licensees meeting the substantial service requirement will be deemed to have met this facet of the renewal expectancy requirement regardless of which of the construction options the licensees chose.⁷² CellularVision asks that we clarify whether

⁶⁵ See *Second R&O*, 12 FCC Rcd at 12656, ¶ 259; see also 47 C.F.R. § 101.67.

⁶⁶ *Id.* at 12657, ¶ 261; see also 47 C.F.R. § 101.1011(b).

⁶⁷ *Fifth NPRM*, 12 FCC Rcd at 12715, ¶ 419.

⁶⁸ *Id.* (citing *Broadband PCS R&O*, 11 FCC Rcd at 21870, ¶ 77).

⁶⁹ *Fifth NPRM*, 12 FCC Rcd at 12715, ¶ 419.

⁷⁰ See CellularVision Comments at 9-10; WebCel Comments at 7; see also *Broadband PCS R&O*, 11 FCC Rcd at 21870, ¶ 77.

⁷¹ See, e.g., *Broadband PCS R&O*, 11 FCC Rcd at 21870, ¶ 77; *WCS R&O*, 12 FCC Rcd at 10840, ¶ 106.

⁷² See 47 C.F.R. § 101.1011(b)(1).

LMDS partitionees and disaggregatees may seek a renewal expectancy that is based upon their reduced license period.⁷³ CellularVision maintains that it would be inequitable, for example, to require a LMDS partitionee with a three-year initial license term to meet the same level of substantial service to obtain a renewal expectancy as the original licensee. We decline to recognize a "scaled-down" substantial service construction requirement for partitionees and disaggregatees. Rather, we believe that parties interested in availing themselves of the partitioning and/or disaggregation opportunities should factor in their ability to meet the substantial service requirement when determining the timing of such transactions. We believe that the provisions we have made for construction options for partitioned and disaggregated licenses provide appropriate flexibility, while ensuring that a reasonable standard of service will be provided to the public and that licensees will not be able to bypass our construction requirements. Moreover, we will address each situation on a case-by-case basis taking into account the amount of time the licensee has had to employ its service along with other factors.⁷⁴

F. Competitive Bidding Issues

24. **Background.** When the Commission adopted the *Fifth NPRM*, the competitive bidding rules for LMDS included installment payments and bidding credits for qualified entities.⁷⁵ It also adopted rules to prevent unjust enrichment by such entities that seek to transfer licenses obtained through use of these special provisions to an entity that would not have qualified for them.⁷⁶ Subsequent to our adoption of the *Fifth NPRM*, the Commission eliminated installment payments for LMDS.⁷⁷ Therefore, the proposals in the *Fifth NPRM* concerning whether partitionees and disaggregatees should be able to qualify for installment payments and how to apportion the remaining government obligation between the parties are now moot.⁷⁸ We note, however, that three levels of bidding credits are available to LMDS applicants.⁷⁹ In the *Fifth NPRM*, the Commission sought comment on how to calculate unjust enrichment payments for LMDS licensees that are awarded

⁷³ See Cellularvision Comments at 10.

⁷⁴ See 47 C.F.R. § 101.1011(c)(1)-(3), (d).

⁷⁵ See *Second R&O*, 12 FCC Rcd at 12688-95, ¶¶ 344-361.

⁷⁶ *Id.* at 12694-5, ¶¶ 360-1; see also 47 C.F.R. § 101.1107(e).

⁷⁷ See *Second Order on Reconsideration*, *supra*.

⁷⁸ We therefore do not need to consider the alternative proposals set forth by CellularVision and DBC concerning the handling of installment payments with respect to LMDS partitioning and disaggregation. See CellularVision Comments at 11-13; DBC Reply Comments at 5-6.

⁷⁹ Bidders with gross annual revenues of not more than \$15 million ("very small businesses") will receive a 45 percent bidding credit, bidders with gross annual revenues of more than \$15 million but not more than \$40 million ("small businesses") will receive a 35 percent bidding credit, and bidders with gross annual revenues of more than \$40 but not more than \$75 million ("entrepreneurs") will receive a 25 percent bidding credit. See 47 C.F.R. §§ 101.1107 and 101.1112(b)-(d).

bidding credits and subsequently partition or disaggregate to a larger business.⁸⁰ It asked commenters to address whether the unjust enrichment payments should be calculated on a proportional basis, using population of the partitioned area and amount of spectrum disaggregated as the objective measures.⁸¹

25. Discussion. We recently adopted a provision in Part 1 of the Commission's Rules for all auctionable services that follows the approach set forth in the *Fifth NPRM* for calculating unjust enrichment payments in the context of partitioning and disaggregation.⁸² Thus, we will follow the uniform procedure set forth in Part 1 of our Rules and calculate unjust enrichment based on population for partitioned areas and on the amount of spectrum for disaggregated spectrum.⁸³ We note that population will be calculated based upon the latest available census data. We have consistently adopted this approach for other wireless services,⁸⁴ and we agree with WebCel that this approach provides an objective means of calculating unjust enrichment payments in the context of partitioning and disaggregation.⁸⁵ For purposes of applying our unjust enrichment requirements when a combined partitioning and disaggregation is proposed, we will use a combination of both population of the partitioned area and amount of spectrum disaggregated to make these *pro rata* calculations.

G. Licensing

26. Background. Because partitioning and disaggregation involves the assignment of a portion of a licensee's service area or spectrum to another entity, in the *Fifth NPRM* the Commission proposed to treat the partitioning and disaggregation of LMDS licenses as assignments requiring its prior approval.⁸⁶ It proposed to follow the existing assignment procedures set forth in Part 101 of our rules for purposes of reviewing LMDS partitioning and disaggregation transactions.⁸⁷

27. Discussion. We adopt the procedures set forth in our *Fifth NPRM* for review and approval of LMDS partitioning and disaggregation transactions. We agree with CellularVision that all

⁸⁰ *Second R&O*, 12 FCC Rcd at 12716, ¶ 422.

⁸¹ *Id.*

⁸² See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413, ¶ 57 (released December 31, 1997) adopting 47 C.F.R. § 1.2111(e).

⁸³ As provided in our rules, the unjust enrichment penalty shall be reduced over time. See 47 C.F.R. § 101.1107(e)(2).

⁸⁴ See, e.g., *Broadband PCS R&O*, 11 FCC Rcd at 21881-2, ¶ 111.

⁸⁵ See WebCel Comments at 7.

⁸⁶ *Fifth NPRM*, 12 FCC Rcd at 12717, ¶ 424.

⁸⁷ *Id.* Section 101.53 of the rules sets forth the procedures for seeking an assignment of license. Section 101.15(e) sets forth the forms to be used for seeking a partial assignment of license.

LMDS partitioning and disaggregation agreements should be subject to our formal assignment process.⁸⁸ We decline to adopt WebCel's proposal that we permit parties to enter into agreements to partition and disaggregate without prior Commission approval so long as notification is given to the Commission by the original LMDS licensee upon consummation of the transaction.⁸⁹ Under WebCel's proposal, the original licensee would retain an ownership interest in the license and would continue to be responsible for compliance with the Commission's rules, maintaining records as to the spectrum allocated and geographic areas served by the different parties, and engaging in frequency coordination among all LMDS license holders within its BTA.⁹⁰ WebCel states that this model would operate like a "landlord-tenant-subtenant" relationship.⁹¹ By contrast, we consider partitioning and disaggregation transactions to be partial assignments of license, for which Commission review and approval is necessary under Section 310(d) of the Communications Act.⁹² Although arrangements such as that proposed by WebCel might be permissible, we note that the Commission requires that the licensee remain in control of its license, and for this determination, the Commission relies on the test announced in *Intermountain Microwave*.⁹³ As a result, any arrangement that would result in a licensee losing control of its license pursuant to the *Intermountain Microwave* indicia would be inconsistent with our requirements for licensee responsibility.

28. WebCel's proposal also does not offer procedures for reviewing transactions where licensees desire to assign a portion of their market or spectrum outright to another entity and do not wish to hold the assigned portion. We thus believe that adoption of Webcel's approach would run counter to our goal of providing LMDS licensees with flexibility to structure partitioning and disaggregation transactions to meet their specific business plans. We conclude that WebCel's proposed

⁸⁸ See CellularVision Reply Comments at 5.

⁸⁹ See WebCel Comments at 9-11.

⁹⁰ *Id.* at 10.

⁹¹ *Id.*

⁹² 47 U.S.C. § 310(d). We note that we recently determined that we would forbear from applying our procedures for reviewing *pro forma* transfers of control and assignments of license involving wireless telecommunications carriers and we decided to allow these carriers to simply notify the Commission after the *pro forma* transaction has been consummated. See Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, FCC 98-18 (February 4, 1998). However, partitioning and disaggregation transactions are not *pro forma* in nature and, therefore, the rationale we followed in that proceeding would not apply here.

⁹³ 24 Rad. Reg. (Pike & Fisher) 983 (1963). The six indicia of *de facto* control are: (a) Does the licensee have unfettered use of all facilities and equipment? (b) Who controls daily operations? (c) Who determines and carries out the policy, decisions, including preparing and filing applications with the Commission? (d) Who is in charge of employment, supervision and dismissal of personnel? (e) Who is in charge of the payment of financing obligations, including expenses arising out of operating. (f) Who receives monies and profits from the operation of the facilities. See also *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42 (1994), *La Star Cellular Telephone Co.*, 5 FCC Rcd 3286 (1990), and *News International, PLC*, 97 FCC 2d 349, 355-56 (1984).

model is not an appropriate construct for characterizing partitioning and disaggregation transactions.⁹⁴ For these reasons, we will not adopt the alternative proposal suggested by WebCel. The procedures we adopt herein correspond to the procedures we have adopted for reviewing partitioning and disaggregation transactions in other wireless services.⁹⁵ We find that adoption of similar partitioning and disaggregation procedures for all wireless services will provide regulatory parity, will permit our processing staff to develop common forms and procedures for reviewing all partitioning and disaggregation applications, and will streamline and expedite the review of such applications.⁹⁶

29. We will require that parties seeking approval for an LMDS partitioning or disaggregation transaction follow the existing assignment procedures set forth in Part 101 of our Rules.⁹⁷ Such applications will be placed on Public Notice and will be subject to petitions to deny. The LMDS licensee will be required to file an FCC Form 702 that is signed by both the licensee and the partitionee or disaggregatee. The partitionee or disaggregatee will also be required to file an FCC Form 430 to demonstrate its qualifications, unless a current FCC Form 430 is already on file with the Commission.

H. Other Matters

30. Background. In our *Second R&O*, we determined that two LMDS licenses, one for 1150 MHz and one for 150 MHz, would be awarded for each Basic Trading Area (BTA) and adopted an eligibility restriction that prohibits incumbent LECs and incumbent cable companies from obtaining an attributable interest in in-region 1,150 MHz LMDS licenses for three years.⁹⁸ We stated, however, that incumbent LECs and incumbent cable companies could obtain LMDS licenses at auction and use partitioning as a means to divest an overlapping portion of the BTA to comply with the eligibility restrictions.⁹⁹ In its comments, WebCel argues that the Commission should reconsider this action and

⁹⁴ See also CellularVision Reply Comments at 5-6.

⁹⁵ See, e.g., *Broadband PCS R&O*, 11 FCC Rcd at 21867-8, ¶¶ 70-71.

⁹⁶ We note that in our *ULS NPRM*, we are proposing a comprehensive consolidation of rules, procedures and forms for licensing the wireless radio services. See *ULS NPRM*, *supra*. The proposed consolidation may result in different procedures and forms required for partitioning and disaggregation transactions in all wireless radio services.

⁹⁷ See 47 C.F.R. § 101.53.

⁹⁸ *Second R&O*, 12 FCC Rcd at 12600 & 12616, ¶¶ 125 & 160. A LEC or cable company is considered "in region" if 10 percent of more of the population of the BTA is within the LEC's authorized telephone service area or the cable company's franchised service area. *Id.* at 12628-9, ¶ 186; see also 47 C.F.R. § 101.1003.

⁹⁹ *Second R&O*, 12 FCC Rcd at 12632, ¶ 195, adopting 47 C.F.R. § 101.1003(f). Incumbent LECs and incumbent cable companies, however, are not permitted to use partitioning or disaggregation to obtain in-region 1,150 MHz LMDS licenses.

should not permit incumbent LECs and cable companies to use partitioning as a means of curing eligibility problems.¹⁰⁰

31. **Discussion.** We decided the issue of whether we should permit incumbent LECs and cable companies to use partitioning to come into compliance with the eligibility restrictions in our *Second R&O*.¹⁰¹ The purpose of our *Fifth NPRM* was not to revisit this issue but to decide the mechanics of implementing partitioning and disaggregation for LMDS. Therefore, we find that, while they were styled as "Comments," a portion of WebCel's pleading is actually an untimely-filed petition for reconsideration of the eligibility rules from our *Second R&O*. We agree with Bell Atlantic, RTG and Sprint that this portion of WebCel's Comments should not be considered in this phase of the proceeding.¹⁰² In this connection, we addressed WebCel's arguments in the *Third Order on Reconsideration* in this proceeding and affirmed the divestiture provision.¹⁰³

V. CONCLUSION

32. We conclude that the rules we adopt herein will provide LMDS licensees with the flexibility to structure partitioning and disaggregation agreements which meet their business needs. We have followed the general framework for partitioning and disaggregation that we have previously adopted for other wireless services in an effort to create regulatory parity among all licensees. As with the other service and licensing rules we have adopted for LMDS, we believe that this action will result in more efficient use of spectrum, will increase opportunities for small businesses and other entities to enter the LMDS marketplace, and will speed service to unserved areas.

VI. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

33. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

B. Ordering Clauses

34. Accordingly, IT IS ORDERED THAT, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), Section 101.1111 of the Commission's Rules, 47 C.F.R. § 101.1111, IS AMENDED as set forth in Appendix B.

¹⁰⁰ WebCel Comments at 11-15.

¹⁰¹ See *Second R&O*, 12 FCC Rcd at 12632, ¶ 195.

¹⁰² Bell Atlantic Reply Comments at 2-3; RTG Reply Comments at 1-3; Sprint Reply Comments at 3-4.

¹⁰³ See *Third Order on Reconsideration*, at ¶¶ 11-45; see also *Melcher v. FCC*, D.C. Cir. No. 93-1110, released February 9, 1998, upholding the LEC and cable eligibility restrictions.

35. IT IS FURTHER ORDERED THAT the rule change adopted herein SHALL BECOME EFFECTIVE sixty days after date of publication in the Federal Register. This action is taken pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

36. IT IS FURTHER ORDERED THAT the Director, Office of Public Affairs, SHALL SEND a copy of this *Fourth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 601(a).

C. Further Information

37. For further information concerning this proceeding, contact Susan Magnotti of the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau at 202-418-0680 or via email at smagnott@fcc.gov.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A

LIST OF COMMENTERS

Comments

Alcatel Network Systems (Alcatel)
CellularVision USA, Inc. (CellularVision)
Hardin & Associates, Inc. (Hardin)
Texas Instruments, Inc. (Texas Instruments)
WebCel Communications, Inc. (WebCel)

Reply Comments

Bell Atlantic Corporation (Bell Atlantic)
CellularVision
Digital Broadcast Corporation (DBC)
Sprint Corporation (Sprint)
The Rural Telecommunications Group (RTG)

APPENDIX B**FINAL RULES**

Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The Table of Contents for Subpart M of Part 101 is revised as follows:

Subpart M -- Competitive Bidding Procedures for LMDS

* * * *

101.1111 Partitioning and disaggregation.

* * * * *

2. Section 101.1111 is revised as follows:

Sec. 101.1111 Partitioning and disaggregation.

(a) *Definitions.*

Disaggregation. The assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

Partitioning. The assignment of geographic portions of a licensee's authorized service area along geopolitical or other boundaries.

(b) *Eligibility.*

(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to Sec. 101.53. Parties shall submit the forms set forth in Sec. 101.15(e).

(2) Licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses.

(c) *Technical Standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as an attachment, a description of the partitioned service area. The partitioned service area shall be defined by coordinate points at every 3 degrees along the partitioned service area unless an FCC recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1983 North American Datum (NAD83). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

In such partitioning cases where an unjust enrichment payment is owed the Commission, the request for authorization for partial assignment of a license must include, as an attachment, a calculation of the population of the partitioned service area and the licensed geographic service area.

(2) *Disaggregation.* Spectrum may be disaggregated in any amount.

(3) *Combined Partitioning and Disaggregation.* The Commission will consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(d) *License Term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in Sec. 101.67.

(e) *Construction Requirements.*

(1) *Partitioning.* Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently satisfy the substantial service requirement for their respective partitioned areas. If either licensee failed to meet its substantial service showing requirement, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the substantial service requirement for the entire market. If the partitionor fails to meet the substantial service standard, however, only its renewal application would be subject to forfeiture at renewal.

(2) *Disaggregation.* Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and disaggregatee would certify that they each will share responsibility for meeting the substantial service requirement for the geographic service area. If parties choose this option and either party fails to do so, both licenses would be subject to forfeiture at renewal. The second option would allow the parties to agree that either the disaggregator or the disaggregatee would be responsible for meeting the substantial service requirement for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the nonperforming party would be subject to forfeiture at renewal.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

Fourth Report and Order

As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Fifth Notice of Proposed Rule Making (*Fifth NPRM*) in CC Docket No. 92-297.¹ The Commission sought written public comment on the proposals in the *Fifth NPRM*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis in this *Fourth Report and Order* (*Fourth R&O*) conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.²

A. Need for and Purpose of this Action:

In the *Fourth R&O*, the Commission modifies the Local Multipoint Distribution Service (LMDS) rules to permit partitioning and disaggregation for all licensees. With more open partitioning and disaggregation, additional entities, including small businesses, may participate in the provision LMDS without needing to acquire wholesale an existing license (with all of the bundle of rights currently associated with the existing license). Acquiring "less" than the current license will presumably be a more flexible and less expensive alternative for entities desiring to enter these services.

B. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis:

None of the commenters submitted comments that were specifically in response to the IRFA.

C. Description and Number of Small Entities Involved

The rules adopted in the *Fourth R&O* will affect all small businesses which avail themselves of these rule changes, including small businesses that will obtain LMDS licenses through auction and subsequently decide to partition or disaggregate, and small businesses who may acquire licenses through partitioning and/or disaggregation.

The Commission has not developed a definition of small entities applicable to LMDS. In the *Second Order on Reconsideration*, the Commission adopted criteria for defining small businesses for

¹ Rule Making to Amend Part 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order*, *Order on Reconsideration* and *Fifth Notice of Proposed Rule Making*, 12 FCC Rcd 12545 (1997) (*Second R&O* or *Fifth NPRM*).

² Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) codified at 5 U.S.C. § 601 *et seq.*)

purposes of determining eligibility for special provisions such as bidding credits.³ The Commission has adopted a three-tier definition of small businesses: businesses with gross annual revenues of not more than \$15 million, business with gross annual revenues of more than \$15 million but not more than \$40 million and businesses with gross revenues of more than \$40 million but not more than \$75 million.⁴ We will use these definitions for estimating the potential number of entities choosing to partition or disaggregate or who may acquire licenses through partitioning and disaggregation that are small businesses.

It is not possible to predict how many LMDS licensees meeting one of the above definitions will be successful at auction and subsequently decide to partition or disaggregate. The Commission plans to issue 2 licenses each for 493 Basic Trading Areas (BTAs). Thus, 986 licenses will be made available for authorization. It is expected that a significant number of successful bidders in the LMDS auction will satisfy one of the above definitions. There is only one company, CellularVision USA, Inc. (CellularVision), that is currently providing LMDS video services. Although the Commission does not collect data on annual receipts, it is assumed that CellularVision is a small business under all of the above outlined definitions. Similarly, it is not possible to determine how many of those entities obtaining licenses through partitioning and disaggregation will meet one of the above definitions. However, it is expected that many entities meeting one of the above definitions will use partitioning and disaggregation as a means to obtain LMDS licenses at lower costs.

D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The rules adopted in the *Fourth R&O* will impose reporting and recordkeeping requirements on small businesses seeking licenses through partitioning and disaggregation. The information requirements will be used to determine whether the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. This information will be given in a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Form 702 which is currently in use and has already received Office of Management and Budget clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents (which may include small businesses) will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information.

E. Steps Taken to Minimize Burdens on Small Entities:

The rules adopted in the *Fourth R&O* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-

³ Rule Making to Amend Part 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Order on Reconsideration*, FCC 97-323 (September 12, 1997) (*Second Order on Reconsideration*).

⁴ See 47 C.F.R. § 101.1112(b)-(d).

based services and are consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services.

Allowing non-restricted partitioning and disaggregation will facilitate market entry by parties who may lack the financial resources for participation in auctions, including small businesses. Some small businesses may have been unable to obtain LMDS licenses through auction due to high bidding. By allowing open partitioning and disaggregation, small businesses will be able to obtain licenses for smaller service areas and smaller amounts of spectrum at presumably reduced costs, thereby providing a method for small businesses to enter the LMDS marketplace.

Allowing geographic partitioning of LMDS licenses by service areas defined by the parties will provide an opportunity for small businesses to obtain partitioned LMDS license areas designed to serve smaller, niche markets. This will permit small businesses to enter the LMDS marketplace by reducing the overall cost of acquiring a partitioned LMDS license.

Allowing disaggregation of spectrum in any amount will also promote participation by small businesses who may seek to acquire a smaller amount of LMDS spectrum tailored to meet the needs of their proposed service.

F. Significant Alternatives Considered and Rejected:

The Commission considered and rejected the following alternative proposals concerning LMDS partitioning and disaggregation.

The Commission rejected a plan set forth by WebCel Communications, Inc. (WebCel). Instead of requiring all partitioning and disaggregation transactions to comply with our existing assignment procedures, WebCel suggested that the Commission permit parties to enter into agreements to partition and disaggregate without prior Commission approval so long as notification is given to the Commission by the original LMDS licensee. The Commission considers partitioning and disaggregation transactions to be essentially partial assignments of license, and Commission review and approval is necessary to ensure compliance with its rules. Thus, the Commission concluded that WebCel's proposed model is not an appropriate construct for characterizing partitioning and disaggregation transactions.

Finally, the Commission rejected a suggestion by CellularVision that LMDS partitionees and disaggregatees should be allowed to qualify for a renewal expectancy which is based upon their reduced license period. The Commission found that this approach would contradict its construction requirements for LMDS partitionees and disaggregatees which require these entities to meet a separate substantial service requirement by the end of their license term. Partitionees and disaggregatees are not permitted to meet a scaled-down substantial service construction requirement simply because of the fact that they had a license term of less than ten years. The Commission found that, by requiring LMDS partitionees and disaggregatees to meet the same substantial service requirement for renewal expectancy as all other licensees, LMDS licensees will be encouraged to quickly develop their markets and fully utilize their available spectrum.